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Supreme Court, U.S.
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No. 94-1473
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1994

TERESA HOBBINS; KENNETH A. SHAPIRO;
WILLIAM DRAKE, Pharm. D.; and
ELLIOT D. LUBY, M.D.,

Petitioners,

v.

ATTORNEY GENERAL OF MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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42 pp

QUESTION PRESENTED

WHETHER MICHIGAN'S TEMPORARY AND NOW-EXPIRED ASSISTED SUICIDE STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION BY PROHIBITING A PERSON FROM INTENTIONALLY PROVIDING THE PHYSICAL MEANS, OR PARTICIPATING IN A PHYSICAL ACT, BY WHICH ANOTHER ATTEMPTS OR COMMITS SUICIDE.

PARTIES

In addition to the four individuals named as Petitioners on the cover of the Petition, the following six individuals were also listed as plaintiffs in the complaint in the Wayne County, Michigan Circuit Court: Marie DeFord, Kenneth Weinberger, Norman Bolton, Kenneth Tucker, Kathryn Upton, and B. Elliot Gryson. The trial court held that these six individuals did not have standing to challenge the statute. App. to Pet. 145a-147a. The Michigan appellate courts did not decide the question of their standing. App. to Pet. 5a, 109a-110a. Those six individuals are no longer parties to this proceeding.

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STATUTE INVOLVED IN THE CASE

The Michigan Criminal Assistance to Suicide Act provided, in pertinent part:

M.C.L. 752.1021; M.S.A. 28.547(121):

> Sec. 1.(1) The legislature finds that the voluntary self-termination of human life, with or without assistance, raises serious ethical and public health questions in the state. To study this problem and to develop recommendations for legislation, the Michigan commission on death and dying is created.
>
> (2) This section shall take effect February 25, 1993.

M.C.L. 752.1024; M.S.A. 28.547(124):

> Sec. 4.(1) Within 15 months after the effective date of this act, the commission shall develop and submit to the legislature recommendations as to legislation concerning the voluntary self-termination of life. . . .
>
> (2) This section shall take effect February 25, 1993.

M.C.L. 752.1027; M.S.A. 28.547(127):

> Sec. 7.(1) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal

assistance to suicide, a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both:

(a) Provides the physical means by which the other person attempts or commits suicide.

(b) Participates in a physical act by which the other person attempts or commits suicide.

(2) Subsection (1) shall not apply to withholding or withdrawing medical treatment.

(3) Subsection (1) does not apply to prescribing, dispensing, or administering medications or procedures if the intent is to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death.

(4) This section shall take effect February 25, 1993.

(5) This section is repealed effective 6 months after the date the commission makes its recommendations to the legislature pursuant to section 4.

STATEMENT OF THE CASE

Petitioners seek review on writ of certiorari of the decision by the Michigan Supreme Court finding that the temporary and now-expired Michigan assisted suicide statute (the "assisted suicide statute"), M.C.L. 752.1021 et. seq.; M.S.A. 28.547(121) et. seq., does not violate the United States Constitution.

Petitioners include two individuals alleged to be suffering from terminal cancer and two health care professionals. The two cancer patients, Hobbins and Shapiro, allege that they may wish to have assistance in committing suicide at some point in the progression of their diseases. First Amended Complaint, ¶¶ 2 and 4. Petitioner Drake, a pharmacist,

alleges that he is asked by physicians to fill prescriptions for large quantities of pain-relieving medications for terminally-ill patients which medications he knows that, if taken in sufficient doses, could cause death. First Amended Complaint, ¶ 6. Petitioner Luby, a psychiatrist, alleges that he prescribes anti-depressant medications to treat chronically depressed patients who have expressed suicidal thoughts and ideations. First Amended Complaint, ¶ 7.

Shortly after the assisted suicide statute went into effect, the above Petitioners, along with several other plaintiffs, brought an action for declaratory and injunctive relief against the Attorney General of Michigan in the

Circuit Court for the County of Wayne, Michigan, alleging that the act was unconstitutional. The parties moved for summary judgment and plaintiffs sought a preliminary injunction against enforcement of the statute. The circuit court found that the statute violated the Michigan Constitutional provision regarding inclusion of multiple objects within a single statute and, in addition, found a due process right to commit suicide. The circuit court, however, declined to issue a preliminary injunction, concluding that a hearing would be needed to determine whether the assisted suicide statute placed an undue burden on that right. App. to Pet. 141a.

On appeal by the Attorney General, this action was consolidated with two

other cases challenging the constitutionality of the assisted suicide statute.[1] On May 10, 1994, the Michigan Court of Appeals issued decisions in the above cases finding that the assisted suicide statute was enacted in violation of the state constitution but that it did not otherwise violate the United States Constitution by making it a criminal offense to assist another in committing suicide. Hobbins v. Attorney General, 205 Mich. App. 194; 518 N.W.2d 487 (1994); App. to Pet. 108a. The Court of Appeals simultaneously released an opinion in another matter dealing with the

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1 Both these latter cases involved criminal charges dismissed prior to trial. People v. Kevorkian (Michigan Court of Appeals Docket No. 171056) and People v. Kevorkian (Michigan Court of Appeals Docket No. 172399).

propriety of murder charges based on an assisted suicide occurring prior to the effective date of the assisted suicide statute.[2]

All parties in the above cases appealed to the Michigan Supreme Court, which consolidated all cases for purposes of argument and decision. By opinion released December 13, 1994, the Michigan Supreme Court held that: (1) the assisted suicide statute had been validly enacted as a matter of state law, (2) the United States Constitution does not pro-

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People v. Kevorkian No. 1, 205 Mich. App. 180; 517 N.W.2d 293 (1994), concluded that the circuit court erred in quashing murder charges where the defendant supplied two individuals with devices for self-administration of anesthesia and carbon monoxide respectively, and then helped them use the devices to cause their deaths.

hibit a state from imposing criminal penalties on one who assists another in committing suicide, (3) involvement in the events leading up to the death of a suicide, such as intentionally providing the means, is not chargeable as murder unless there is probable cause to believe that death was the direct and natural result of the defendant's act, but may be prosecuted as a common law felony of assisting in a suicide, and (4) the motion to quash murder charges must be reconsidered by the circuit court to determine whether the evidence produced at the preliminary examination was sufficient to bind the defendant over for trial.[3] People v. Kervorkian and Hobbins

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[3] Holdings 3 and 4 pertained to Kevorkian No. 1, discussed above in footnote 2.

v. Attorney General, 447 Mich. 436; ___ N.W.2d ___ (1994); App. to Pet. 1a.

Petitioners now seek a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Temporary Statute Prohibiting Physical Assistance To Suicide Has Expired, Thereby Mooting The Present Case.

The Michigan assisted suicide statute instituted a temporary criminal prohibition on certain activities in assistance of suicide. M.C.L. 752.1027; M.S.A. 28.547(127). The statute also established an advisory commission to study end of life issues and to submit to the legislature a report with recommendations as to legislation concerning the voluntary self-termination of life. M.C.L. 752.1021; M.S.A. 28.547(121). The commission was given 15 months from the effective date of the statute to issue its report and recommendations. M.C.L.

752.1024; M.S.A. 28.547(124). The criminal provisions were set to expire 6 months later. M.C.L. 752.1027(5); M.S.A. 28.547(127)(5).

The assistance to suicide statute went into effect on February 25, 1993. The commission released its report on or about June 8, 1994. The criminal provisions of the statute, therefore, have expired.[4]

In this action, Petitioners sought prospective declaratory and injunctive

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[4] It is arguable that these provisions expired six months after May 25, 1994, the date established by the statute for submission of the report, since a delay in submission of the report could not extend the criminal provisions without constituting the exercise of an unconstitutional delegation of legislative authority.

relief solely "against the enforcement of Section 7 of 1992 P.A. 270, House Bill No. 4501, M.C.L. 752.1021 et. seq., amended by 1993 Senate Bill 211, which prohibits 'criminal assistance to suicide.'" First Amended Complaint, ¶ 1. The singular basis for Petitioners' due process claim was the alleged statutory prohibition of "any assistance by a physician, licensed health care professional, family member, or friend to a terminally ill person who wishes to hasten the inevitable termination of his or her life in order to avoid extreme and unbearable pain and suffering." First Amended Complaint, ¶ 28.

The long-standing rule followed by this Court is that a case must be dismissed as moot "if an event occurs

[pending review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." Church of Scientology of California v. United States, 506 U.S. ___; 113 S. Ct. 447; 121 L. Ed. 2d 313, 319 (1992), quoting Mills v. Green, 159 U.S. 651, 653; 16 S. Ct. 132; 40 L. Ed. 293 (1895). This principle is fully applicable to the instant case. Petitioners here sought only prospective relief regarding a specific statutory provision. The challenged statute no longer exists. In these circumstances, an order declaring its unconstitutionality and enjoining its enforcement would be meaningless. Petitioner's case is moot. See, e.g., Burke v. Barnes, 479 U.S. 361, 363-365; 107 S. Ct. 734; 93 L. Ed. 2d 732 (1987) (statute expired by its own terms; therefore case is moot).

This is not a case where a savings clause permits continued enforcement proceedings under an expired or repealed statute, or where prior application of the law may entitle a party to damages. See Koch Refining Co. v. U.S. Dept. of Energy, 658 F.2d 799, 805 (Temp Emer. Ct. App., 1981); Richmond v. J.A. Croson Co., 488 U.S. 469, 478, n. 1; 109 S. Ct. 706; 102 L. Ed. 2d 854 (1989) (expiration of set-aside law did not moot case where parties had continuing controversy over question whether prior application of ordinance entitled plaintiff to damages). It is also not a case where a substantially similar replacement statute has been enacted which proscribes the same conduct. See, Northeastern Florida Contractors v. Jacksonville, 502 U.S. ___; 113 S. Ct. 2297; 124 L. Ed. 2d 586 (1993).

The expiration of a temporary criminal provision does not present a matter capable of repetition, yet evading review under the doctrine first announced by this Court in Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515; 31 S. Ct. 279; 55 L. Ed. 310 (1911). The Michigan Legislature may or may not enact some form of criminal prohibition against assistance to suicide at some time in the future. However, even if the legislature passes a new law to govern this area, there is no assurance that a new statute would proscribe the conduct alleged as protected by plaintiffs in this action. Kremens v. Bartley, 431 U.S. 119, 128-130; 97 S. Ct. 1709; 52 L. Ed. 2d 184 (1977) (challenge to law permitting parents to commit juveniles under 18 to mental hospital mooted, with respect to

those over 13, by new legislation permitting such commitment only of juveniles 13 and under); Board of Public Utility Comm'rs v. Compania General De Tabacos De Filipinas, 249 U.S. 425, 426; 39 S. Ct. 332; 63 L. Ed. 687 (1919) (challenge to statute alleged to constitute unlawful delegation of legislative power to regulatory board dismissed after statutory amendment detailed board's responsibilities); Berry v. Davis, 242 U.S. 468, 470; 37 S. Ct. 208; 61 L. Ed. 441 (1917) (suit to enjoin mandatory vasectomy on plaintiff dismissed after statute requiring operation was replaced by law inapplicable to plaintiff). It is at least within the realm of possibility that a new statute could exempt the conduct alleged by Petitioner in this action from penalty.

Thus, the controversy with respect to the expired criminal provisions of the Michigan assisted suicide statute is moot. A declaration of its invalidity or an injunction against the law's future enforcement would not benefit the Petitioners. It is sheer speculation to anticipate passage of legislative in the future that might impact the interest asserted by Petitioners. Denial of certiorari in these circumstances is necessary to avoid the possibility that this Court will render an advisory decision.

2. Petitioners Lack Standing.

Petitioners assert that they have "continuing standing" to assert their federal constitutional claim because the Michigan Supreme Court has now recognized a common law crime of "assisting suicide"

which would apparently not require active participation in an overt act directly causing death. App. to Pet. 56a-59a. Petitioners, however, also state that the present case does not "challenge the Michigan law as it prohibits 'assistance to suicide' in the ordinary sense of the term." Pet. p. 7, n. 8. At this point, there are no cases interpreting and applying the newly discovered Michigan common law of assisting suicide in a specific factual context.

A threshold question in every federal case is whether a plaintiff has sufficiently alleged a "case or controversy" within Article III of the United States Constitution. Warth v. Seldin, 422 U.S. 490; 95 S. Ct. 2197; 45 L. Ed. 2d 343 (1975). A plaintiff invoking the juris-

diction of this Court must establish, at an irreducible constitutional minimum that: (1) they have suffered an "injury in fact" or an invasion of a legally-protected interest which is concrete and particularized and "actual or imminent," (2) there is a causal connection between the injury and the challenged conduct, and (3) it must be likely that the injury will be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555; 112 S. Ct. 2130, 2136; 119 L. Ed. 2d 351 (1992). Though this Court has recognized that "imminence" is an elastic concept, it is one which must be limited so that an alleged injury is not too speculative. Id., 112 S. Ct. 2130, 2138-2139 at n. 2 (alleged injury to occur at some indefinite future time is not sufficient). The

injury must proceed with a "high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." Id.

In this case, it remains only a hypothetical possibility that the patient Petitioners or the physician Petitioners[5] might engage in conduct that might lead to a prosecution of someone under the newly declared Michigan common law of assisting suicide. This possibility lacks the high degree of immediacy necessary for invocation of federal jurisdiction.

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5 It should be noted that Petitioners Luby and Drake were granted standing by the Circuit Court only with regard to their vagueness challenge to the statute. App. to Pet. 153a-155a.

3. The Present Case Is Not Ripe For Review.

Even assuming arguendo that Petitioners possess sufficient standing to present a federal challenge to the Michigan common law of assisting suicide, the controversy is not ripe for review by this Court.

Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so. Federal courts presumptively lack jurisdiction "unless 'the contrary appears affirmatively from the record.'" Bender v. Williamsport Area School Dist., 475 U.S. 534, 546; 106 S. Ct. 1326; 89 L. Ed. 2d 501 (1986), quoting King Bridge Co. v. Otoe County, 120 U.S. 225, 226;

7 S. Ct. 552; 30 L. Ed. 623 (1887). "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Bender, supra, at 546, n. 8, quoting Warth v. Seldin, supra, 422 U.S. at 517-518.

Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 136-148; 95 S. Ct. 335; 42 L. Ed. 2d 320 (1974). Petitioners have failed to demonstrate a live dispute involving the actual or threatened application of the Michigan common law of

assisting suicide. The Petition notes that "[a]lthough laws against 'assisted suicide' have long been in effect in many states, these laws have rarely been enforced," and that the original purpose of such laws was to prevent assisting suicide in "the ordinary sense of the term," the application of which is not challenged by Petitioners in this action. Pet. p. 7.

Here, there is no factual record of an actual or imminent application of the Michigan common law sufficient to present the constitutional issue in "clean-cut and concrete form." Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 584; 67 S. Ct. 1409; 91 L. Ed. 1666 (1947). The record also contains no evidence of a credible threat that the

Michigan common law of assisting suicide will be enforced in the types of cases hypothesized by Petitioners.

In this case, postponement of consideration of the questions presented until a more concrete controversy arises has the advantage of permitting Michigan courts a further opportunity to construe the common law prohibition against assisting suicide. The process of subsequent construction may well "materially alter the question to be decided." Babbitt v. Farm Workers, 442 U.S. 289, 306; 99 S. Ct. 2301; 60 L. Ed. 2d 895 (1979); see also Webster v. Reproductive Health Services, 492 U.S. 490, 506; 109 S. Ct. 3040; 106 L. Ed. 2d 410 (1989) (plurality opinion). Otherwise this Court will have to assume that the

Michigan common law reaches the types of cases hypothetically posited by the Petitioners. "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." Longshoremen v. Boyd, 347 U.S. 222, 224; 74 S. Ct. 447; 98 L. Ed. 650 (1954).

Petitioners here seek to present a non-First Amendment facial challenge to newly declared state common law in an action that originally challenged only a temporary statutory enactment. There is no currently pending or imminently threatened enforcement action. Petitioners' claim, therefore, is not ripe for review by this Court.

4. The Michigan Supreme Court Correctly Applied Long-Standing Fourteenth Amendment Jurisprudence In Finding That The Constitution Does Not Protect A Right To Have Assistance In Committing Suicide.

Petitioners invite this Court to consider recognition of a constitutional right to a species of "non-ordinary" assisted suicide. In stark terms, Petitioners seek a declaration that competent, terminally ill persons have a right to obtain a lethal dose of prescription medicine from their doctors for the purpose of killing themselves.

Petitioners attempt to ground this new constitutional right on notions of substantive due process. It is argued that having assistance in ending one's own life is a fundamental liberty

interest arising from concepts of personal autonomy, bodily integrity and informed consent as recognized in Planned Parenthood v. Casey, 505 U.S. ___; 112 S. Ct. 2791; 120 L. Ed. 2d 674 (1992) and Cruzan v. Director, Missouri Dep't. of Health, 497 U.S. 261; 110 S. Ct. 2841; 111 L. Ed. 2d 224 (1990).

This Court has been properly circumspect in utilizing substantive due process to "discover" and thereby constitutionalize new fundamental rights "because guideposts for responsible decision-making in this uncharted area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115; 112 S. Ct. 1061, 1068; 117 L. Ed. 2d 261 (1992).

Where, as here, an asserted liberty interest lacks a basis in the text of the

Constitution or the Bill of Rights, it must be found that such right is either implicit in the concept of ordered liberty or deeply rooted in this Nation's history or traditions. Bowers v. Hardwick, 478 U.S. 186, 191; 106 S. Ct. 2841; 92 L. Ed. 2d 140 (1986). The history and tradition of this nation lend no support to recognition of a right to assisted suicide, and Petitioners present no argument to the contrary. As recently noted by the majority in Compassion in Dying v. Washington, ___ F.3d ___ (No. 94-35534, March 9, 1995), 1995 U.S. App. LEXIS 4589 at 14:

> In the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction.

The suggestion that the rationales of Cruzan and Casey ordain discovery of the right asserted in this case represents a basic misunderstanding of those decisions. The limited right to refuse unwanted medical treatment recognized in Cruzan rested on long-standing tort concepts. Cruzan did not question the paramount interest of the State in the protection and preservation of human life as evidenced by the laws of a majority of the States that criminalized assisting suicide. There is a basic difference, which Petitioners refuse to acknowledge, between allowance of a passive natural death as a consequence of refusing treatment and active intervention by a physician to cause the death of a patient though administration of lethal drugs.

Casey concerned reproductive rights in the context of a reconsideration of Roe v. Wade, 410 U.S. 113, 157-159; 93 S. Ct. 705; 35 L. Ed. 2d 147 (1973). In reaffirming Roe, Justice O'Conner, writing for a plurality, recognized the "unique" circumstances of a pre-viability abortion. 112 S. Ct. 2807. In contrast, assistance to suicide involves the destruction of a human life in being. It is not a "natural sequel" to reproductive automony. See 112 S. Ct. 2838 (Stevens, J., concurring in part, dissenting in part) (describing Roe as the natural sequel to earlier contraception cases). The right asserted here is not part of the "rational continuum" represented by the contraception/reproductive rights cases.

Despite the absence of support in history or case law, Petitioners contend that the time is ripe for this Court to authoritatively decide the matter as an issue of first impression. There is no doubt that the concept of physician assisted suicide presents a complex societal question fraught with ethical and policy considerations. The two recent reports of state task forces[6] that comprehensively studied the matter plainly recognized that any legalization of a right to assisted suicide would represent a dramatic change in public policy with attendant significant risks to vulnerable segments of society. This Court should hesitate to rush to judgment.

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6 The Michigan and New York study commission reports are referenced and discussed in Compassion in Dying, supra, 1995 U.S. App. LEXIS 4589, at 15-19.

When confronted with frontier legal problems, this Court has recognized that periods of "percolation" in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court. Arizona v. Evans, ___ U.S. ___ (No. 93-1660, March 1, 1995), Justice Ginsburg, dissenting (citing McCray v. New York, 461 U.S. 961, 963 (1983), Stevens, J, respecting denial of petitions for writs of certiorari, ". . . it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court").

The decision of the Michigan Supreme Court in this case comports with the his-

toric traditions of this Nation and is consistent with the Fourteenth Amendment jurisprudence of this Court. There is no compelling reason for review or disturbance of that decision.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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6:Hobb-B/B7